IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1896. No. 463.

Pullman's Palace Car Company, Appellant,

vs.

Central Transportation Company, Appellee.

Sur MOTION TO DISMISS APPEAL.

REPLY TO APPELLANT'S BRIEF.

In a brief upon a motion to dismiss for want of jurisdiction, a discussion upon the merits would seem to be out of place, and although in the argumentative "statement" contained in appellant's brief there are many assertions which, it is believed, are contrary to the record, the appellee will not waste the time of the court in discussing them. There is, however, one statement which ought not to be allowed to pass unnoticed. On page 6 of the brief, appellant, speaking of the judgment of this court in Central Transp. Co. *vs.* Pullman Car Co., 139 U. S., 24, says:—

> The record shows this judgment of this court reviewed and a contrary conclusion reached by Butler, District Judge, sitting in the Circuit Court.

This statement is entirely at variance with the fact. It so happened that every decision in the Central Transportation litigation—the granting of the injunction upon the bill in

equity filed by the Pullman Company, the judgment of nonsuit in the suit on the lease and the final hearing on the bill in equity and cross bill—were made by a court composed of two judges, one a circuit judge and the other the district judge named in appellant's brief. Judge Butler had taken part in the judgment of nonsuit which this court affirmed in Central Transportation Company *vs.* Pullman Car Company, 139 U. S., 24, and he had previously taken part in the granting of the injunction on the application of the Pullman Company. It would be strange indeed if he had "reviewed" a decision affirming his own judgment and had "reached a contrary "conclusion" from the affirmance of his own conclusion. Nothing of the kind occurred. He, in conjunction with Judge McKennan, had decided that the lease was invalid and that no action could be maintained on it, and had granted a nonsuit. The Supreme Court affirmed the judgment, but as if to guard against any use of it to confiscate the leased property, Mr. Justice Gray, in delivering the opinion, had added :—

> A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money parted with on the faith of the unlawful contract to be recovered back or compensation to be made for it.

Up to this time the Pullman Company had disclaimed any intention to keep the property without compensation, and was actively prosecuting its bill in equity, based, *inter alia*, upon an allegation that the lease was void, and that the property was of such a nature that the aid of a court of equity was necessary to state an account and determine the compensation. Immediately, however, upon obtaining the affirmance of the decision that the lease was void, it went into the court below and sought to withdraw its bill and to keep the property without any compensation. In deciding that it could not do so the court below, so far from coming to an opposite conclusion from this court, followed the suggestion made

in the opinion affirming the judgment. In comparing the two opinions appellant has selected portions of each, and has failed to print the portion of Mr. Justice Gray's opinion above cited. On the law the two opinions are in entire harmony, and any apparent discrepancy as to facts arises from the different circumstances disclosed by the evidence. In the case in which the judgment was affirmed by this court there was no evidence as to good faith or as to value of property, except the inferences which might be drawn from the lease itself. In the equity suit there was a mass of testimony; the opinion of the court was delivered in the light which that testimony threw upon the case. Nowhere in the opinions is there any conflict as to legal principles, and the opinion of the court below is a direct application of the principles laid down by the court above to the facts as disclosed by the evidence taken in the equity case. It may be added that Judge Acheson sat with Judge Butler and took part in the decision sustaining the cross bill, and that Judge Dallas sat with him and delivered a concurring opinion on the final hearing.

It is the privilege, and in this case it seems to be the pleasure, of an appellant to attack the court below, but there would seem to be a curious ingratitude in such an attack upon a court which had first upheld the appellant's contention that the lease was invalid and whose judgment, affirmed by this court, is relied upon by appellant as its protection against the enforcement of the rental which it had agreed to pay.

FRANK P. PRICHARD,
JOHN G. JOHNSON,
For Central Transportation Company.